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No. 174.

IN THE

# Supreme Court of the United States.

JAMES STILLMAN,
*Appellant,*
*against*
C. B. COMBE, Executor of the Estate of Stephen Power, deceased, ET AL.,
*Appellees.*

# BRIEF FOR APPELLANT.

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# Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 174.

JAMES STILLMAN,
Appellant,

AGAINST

C. B. COMBE, Executor of the Estate of Stephen Power, deceased, *et al.*,
Appellees.

Brief for Appellant.

## Statement.

This is an appeal from a final decree rendered by the United States Circuit Court for the Southern District of Texas.

The appeal was allowed and certified by that Court directly to this Court upon the sole question of its jurisdiction (p. 561). The appeal also brings up for review various interlocutory orders and decrees (pp. 554, 561).

Jurisdiction was entertained by the Circuit Court solely upon the ground that the suit was ancillary to *an action at law* in the same Court, in which final judgment had been rendered in July, 1887 (p. 562),

ten years before the commencement of the present suit (p. 18).

The present suit was brought by a citizen of Texas, to compel the appellant Stillman, a citizen and resident of New York, and Thomas Carson, a citizen of Texas, as Administrator of the Estate of Maria Josefa Cavazos, to pay into the Court and account for a fund of $160,000, which was held by the appellant in New York (pp. 237, 354). The complainant claimed to be entitled to one-half of this fund (p. 17). Various other persons, citizens of Texas and elsewhere, were made parties to the suit. By the final decree, there was awarded to the complainant, for his entire interest in the fund, the sum of $2,771.30 (p. 414). The remainder of the fund, with the exception of $1,385.65, after allowing for various costs and expenses, was directed to be divided equally between Mr. Stillman, the appellant, and the next of kin of Maria Josefa Cavazos, of whose estate Mr. Carson was the Administrator (pp. 413–414).

Both Mr. Stillman and Mr. Carson, at every stage of the litigation, denied the right of the court to compel the payment of any sum of money into its registry, and to distribute the amount so paid, on the ground that the court was without jurisdiction.

The bill of complaint shows that the sum in question represented the amount paid, in 1895, by the United States to Stillman and to Carson, as Administrator, for the Fort Brown Military Reservation, at Brownsville, Texas (p. 13). That property had been occupied by the United States, as a military post, ever since the commencement of the Mexican War (pp. 3–4). In 1885, Congress appropriated $160,000 to pay for the property and for its use and occupation, and enacted that no part of this sum should be paid until a complete title had been vested in the United States; and it further required the full price to be paid directly to the owners (p. 5). In 1886, Leocadio Salinas and others, the heirs of Miguel Salinas, claiming to be entitled to the property, commenced an action in eject-

ment in the District Court of Cameron County, Texas, against Colonel Kellogg, an officer in command at Fort Brown, to recover its possession. The action was removed into the United States Circuit Court, where it was entered upon the *law docket*, as Number 248 (pp. 5–6). Thereafter, various other parties, including the heirs and legal representatives of Maria Josefa Cavazos, deceased, were made parties defendant and filed answers in reconvention, as permitted by the Texas practice, setting up their claims of title (p. 6). The action was brought to trial in July, 1887, and a verdict rendered by the jury, in favor of Stillman and of Carson, as Administrator, finding that the title was vested in them, in equal moieties (p. 10). Final judgment was entered accordingly (pp. 11–12).

In 1895, about eight years after the entry of that judgment, Stillman and Carson, as Administrator, conveyed the property to the United States, which paid for it $160,000, the amount of the said appropriation (p. 13). It is the said action at law, of Salinas v. Kellogg, and the judgment entered in it, whose finality and validity have never been questioned by any one, to which the present suit was held by the Court below to be ancillary ; and it was upon that ground alone, that jurisdiction of the cause was entertained (p. 562).

In the Court below, the complainants did not attack the validity of the judgment in Salinas v. Kellogg, and did not ask the aid of the Court to enforce the judgment or to obtain any relief of any kind under the judgment. The sole ground for claiming that the present suit was ancillary to the action at law, was that the verdict had been rendered and the judgment entered without any actual litigation of the claims of the various parties to the property, and pursuant to a written agreement, known as an arbitration agreement, by which a judgment was to be permitted in favor of Stillman and of Carson, as Administrator, who were thereafter to convey the property to the United States, collect the appropriation and pay it over, less $20,000 allowed for expenses, to a Texas bank, to the credit of

three arbitrators named, who were then to proceed to determine the conflicting claims and distribute the remainder of the fund accordingly (pp. 9–10, 26).

This arbitration agreement was not executed by all of the parties to the action (pp. 26–29, 415, 455–456), and it expressly purports to have been entered into "between and among *certain reconvening defendants*" (p. 26); it was not filed in the action and made part of the record, and was not brought to the attention of the Court or of the United States (pp. 496, 562), and some evidence was given on the trial (pp. 473, 494, 496).

The complainant below contended that the mere fact that Stillman and Carson, as administrator, had, prior to the entry of the judgment, agreed with some of the parties to the action at law to make a certain disposition of the proceeds of the Fort Brown property when received, and failed to do so, therefore, they could invoke the aid of the Court, on its equitable side, not to set aside or modify the judgment, and not even to compel specific performance of the arbitration agreement, but, in utter disregard of that agreement to compel the payment of the entire amount into Court, without even deducting the $20,000 allowed by the agreement for expenses, and then proceed to distribute it; and this too, although the fund was at the time of the commencement of this suit held by Mr. Stillman in New York (pp. 237, 549, 550); no part of it, as the Court below expressly adjudged, ever having come into the possession of Carson (p. 354). In other words, the claim was advanced and sustained by the Court below, that the mere breach of an arbitration agreement, entered into in an action at law, where the judgment is not complained of, gave a court of equity power to summon the parties to that agreement before it, although they resided in another State, and compel them not to arbitrate as they had agreed to do, but to litigate the issues that had been finally determined by the judgment in the previous action. This was done, too, in spite of the fact that it affirmatively appeared

from the bill of complaint (p. 14) that one of the three arbitrators had died and another had refused to act, and that Mr. Stillman and Mr. Carson had no power to appoint their successors (p. 28). This fact was also shown upon the trial, as well as the fact that some of the parties to the arbitration agreement had previously repudiated it (p. 497). Thus, not even a breach of the arbitration agreement by Stillman and Carson was shown. Neither was it claimed that Mr. Stillman was insolvent or unable to respond in an action at law for the breach of the contract.

Soon after the bill in this case was filed, the complainant made a motion for the appointment of a receiver of the fund, and to compel the defendant Stillman, who held the fund in New York (p. 237), to pay it into the registry of the Court (p. 54), and for an injunction as prayed for in the bill. Mr. Stillman had not then appeared, nor had service of the subpœna been made upon him even in New York. Mr. Carson, as Administrator, appeared, and opposed the motion, on the ground that the Court did not have jurisdiction of the suit and that he never had possession of the fund (pp. 55–59).

The motion was granted, a receiver of the fund was appointed and Stillman and Carson were nominally enjoined from using the judgment to deprive the complainant and others of their interest in the fund, and from refusing to pay the fund into Court, and account for the same (pp. 62–63). This injunction was an evident nullity, in so far as it attempted to enjoin the defendants from using the judgment for any purpose, as that was something which they could not possibly do, because of the fact that they had previously conveyed the property to the United States, and the judgment had become *functus officio*. The injunction was also an obvious absurdity, in so far as it attempted to restrain the defendants from not paying the fund to the Receiver or from not accounting. However, the form of the order was sufficient to enable an appeal to be taken to the Circuit Court of Appeals, where the order was af-

firmed (p. 136). While that Court recognized that the question of jurisdiction was "of paramount concern," it refused to pass upon it, deeming it "of such gravity and vital character that, in our opinion, the appeal from the interlocutory judgment should not be suffered to become the vehicle of bringing it up for premature determination" (p. 145); and the Court concluded that the question of jurisdiction should be left until after the final decree, when it might be carried directly to this Court (p. 146).

How roundabout and costly that method has been appears in part from the present record. The decision of the Circuit Court of Appeals was rendered in March, 1898 (p. 136), and the final decree was not entered until December, 1903, p. 43), nearly six years later. By that decree, the Court found that Stillman and Carson, in collecting the fund from the Government, had properly expended $53,818.02, including $8,101.02 paid on the property for taxes, leaving a balance of only $106,818.98 for distribution (p. 413). Out of this sum, $3,942 were allowed to the clerk of the court for costs, $500 to the Receiver, $2,771.30 to the complainant, $10,000 to the complainant's counsel, and the remainder, with the exception of $1,385.65, to Mr. Stillman and the Cavazos estate (p. 414). In other words, as a result of this prolonged litigation, the claimants of the appropriation, other than Stillman and the Cavazos estate, received $4,466.95, of which the complainant, who had claimed one-half of the entire appropriation was awarded only $2,771.30. That the cost of this litigation must have been enormous is obvious, partly from the bulk of the present record, but chiefly from what has been omitted; the huge volume of evidence in relation to the title having been omitted by the direction of the Court below, which certified only such portions of the record as bore upon the question of jurisdiction (p. 562).

Subsequent to the decision of the United States Circuit Court of Appeals, the defendant Stillman appeared

in the suit, solely for the purpose of testing the jurisdiction of the Court, and filed a plea to the jurisdiction (pp. 71–75). A similar plea was filed by the defendant Carson, as Administrator (pp. 75–79). Both pleas were overruled (p. 126).

Subsequently, a motion was made to compel the defendants Stillman and Carson, as Administrator, to pay the sum of $160,000 to the Receiver (p. 220). In his answer to that application, Carson showed that no part of the fund had ever come into his possession (p. 225). The defendant Stillman, protesting against the jurisdiction of the Court, admitted that the entire fund had been received by him and was held by him in New York, and claimed credit for certain expenditures made by him (pp. 229–238). The application was denied as to Carson, on the ground that he had never had possession or custody of the fund; but it was granted as to Stillman, although he was allowed a credit of $33,111.02 (pp. 354, 355); and, thereafter, the entire remainder of the appropriation was paid into court or secured in the manner directed (pp. 356–403), although, as has been heretofore stated, the complainant claimed only one-half of the appropriation. Pleas in abatement and demurrers to the original and amended bills were overruled. Thereupon, still protesting against the jurisdiction of the Court, the defendant Stillman answered the original, amended and second amended bills (pp. 242, 377). Issue was duly joined; and the case was heard and determined on its merits, with the result heretofore stated.

The final decree shows that the defendant Stillman protested against the jurisdiction of the Court throughout the litigation (p. 409).

There is as little restraint shown in the liberal provisions of the final decree (such as allowing to the complainant's counsel nearly four times the amount awarded to the complainant himself) as is shown in the amended and supplemental bills of complaint, which furnish a striking example of the "hybrid

system of pleading," which still crops up occasionally in Texas, in spite of the caustic criticism of this Court.

Randon v. Toby, 11 How., 493, 517.
Green v. Custard, 23 How., 484, 486.

### Specification of Error.

The Court below erred in holding that it had jurisdiction of the cause (pp. 554–557).

## POINTS.

## FIRST.

### The sole ground upon which jurisdiction was entertained.

The certificate of the Court below shows that the sole ground of jurisdiction relied upon was that the suit was ancillary to the action at law (p. 562). There was no diversity of citizenship, no fund in the custody of the Court and the case did not involve the construction of the Constitution or of any Federal Statute.

## SECOND.

### Jurisdiction must be clear and appear affirmatively.

The United States Circuit Court, being a court of statutory and limited jurisdiction, the presumption at every stage of a cause in that Court is that the Court

is without jurisdiction, unless the contrary affirmatively appears from the record.

Turner v. Bank of N. A., 4 Dall., 8.
Bors v. Preston, 111 U. S., 252.
Mansfield, etc., R. Co. v. Swan, 111 U. S., 379, 383.
Lehigh, etc., Co. v. Kelly, 160 U. S., 327, 337.

## THIRD.

### Appellant's right to raise question of jurisdiction.

I. The appellant has not waived his right to object to the jurisdiction, by having served an answer after his plea to the jurisdiction under a limited appearance had been overruled.

Harkness v. Hyde, 98 U. S., 476.
So. Pac. Co. v. Denton, 146 U. S., 202.
Mexican R. Co. v. Pinkney, 149 U. S., 194.

II. The appellee's contention, that the affirmance by the Circuit Court of Appeals of the interlocutory order appointing a receiver and enjoining the defendants from using the former judgment to the injury of the complainant, precludes the present appeal from the final decree, is so fanciful as to require no serious comment. Mr. Stillman, the present appellant, was not even a party to the appeal to the Circuit Court of Appeals.

## FOURTH.

### Ancillary.

Ancillary is that which is auxiliary or subordinate to something else, serving as an aid, adjunct or accessory to it. A thing cannot be ancillary to another, unless it in some manner tends to supplement or complete the other. If a thing is complete in itself, nothing can be ancillary to it.

The most frequent application of the term in the law is in connection with the administration of estates and in the appointment of ancillary executors, administrators, guardians or receivers, where the ancillary administration is supplemental to the principal administration, without which the estate could not be completely administered.

## FIFTH.

### Ancilliary Jurisdiction.

A suit is ancillary when it is supplemental to a previous action or suit and so connected with it as to form an incident to it and substantially a continuation of it.

Barrow v. Hunton, 99 U. S., 80, 82.
Marshall v. Holmes, 141 U. S., 589, 597.
Raphael v. Trask, 194 U. S., 272, 278.

The cases in which suits have been held to be ancillary fall into two general classes:

I. Where the Court has possession of a fund derived from the previous litigation.

II. Where the Court is asked to take some action with reference to a previous judgment or decree rendered by it or with reference to an action at law still pending and undetermined.

I. In the following cases, the Court was in control of the fund at the time of the commencement of the ancillary suit:

Freeman v. Howe, 24 How., 450.
Minnesota Co. v. St. Paul Co., 2 Wall, 609.
Bank v. Calhoun, 102 U. S., 256.
Krippendorf v. Hyde, 110 U. S., 276.
Gumble v. Pitken, 124 U. S., 131.
Morgan's Co. v. Texas Central Railroad, 137 U. S., 171.
*Re* Tyler, 149 U. S., 164.
White v. Ewing, 159 U. S., 36.
Boggs v. Martin, 179 U. S., 206.
Julian v. Central Trust Co., 193 U. S., 93, 113.
McBee v. Marietta Railroad, 48 Fed., 243.
Compton v. Jessup, 62 Fed., 263.
N. Y. Commercial Co. v. Francis, 83 Fed., 769.
Widaman v. Hubbard, 88 Fed., 806.
Davis v. Martin, 113 Fed., 6, 9.
Memphis Bk. v. Houchens, 115 Fed., 96, 110, 111.
*In re* Sabin, Fed. Case No. 12,195.

II. The second class of cases, where ancillary bills have been entertained, is where the Court is asked to take some action with reference to a previous judgment or decree rendered by it or with reference to an action still pending and undetermined. There are two different kinds of applications which can be made under this class.

1. To assist in carrying the previous judgment or decree into effect.

2. To correct or modify the previous judgment or decree, or to vacate it on the ground of fraud or mistake, or to enjoin its enforcement, or to enjoin the prosecution of a pending action at law.

1. Where the previous action was one at law, the method of enforcing the final judgment in it is by a common law writ. In an action of debt or assumpsit or conversion, the writ is an execution. In an action of ejectment, it is a writ of possession.

A court of equity lends its assistance for the purpose of enforcing a previous judgment in an action at law only where the common law writ is ineffective, as, for instance, where property belonging to the judgment debtor and properly applicable to the satisfaction of the judgment, is held for his benefit by another or has been fraudulently disposed of by him.

Babcock v. Millard, Fed. Case No. 699.
Hatch v. Dorr, 4 McLean, 112, Fed. Cas., 6206.
Bank v. Turnbull, 16 Wall., 190.
New Orleans v. Fisher, 180 U. S., 185.

The cases in this subdivision, in which a court of equity is most frequently appealed to, are those where some additional action is essential to make the previous decree of the court in a suit in equity effective. Such cases are the directing of a supplemental account, compelling the performance of some affirmative act or the observance of the terms of the previous decree, etc.

Railroad Co. v. Chamberlain, 6 Wall., 748.
Root v. Woolworth, 150 U. S., 401.

2. Suits brought to correct, modify or vacate judgments or decrees or to enjoin their enforcement or to enjoin the prosecution of a pending action at law.

Every Court of general jurisdiction has complete control over its own proceedings and over its judgments and decrees, during the term at which they are rendered; and at any time before the end of the term, it may set aside or amend them in any manner deemed advisable.

Henderson v. Carbondale, 140 U. S., 25, 40.

But it has no power to do this, upon petition, after the expiration of the term.

Bronson v. Schulten, 104 U. S., 410.
Central Trust Co. v. Grant Locomotive Works, 135 U. S., 207;

although, in some States, this power has been extended by statute beyond the term at which the proceedings were held (New York Code Civil Procedure, Sec. 1282).

But where, owing to the expiration of the term, the Court has no power to grant relief upon petition, it will do so upon suit brought for the purpose; and such suit is regarded as dependent or ancillary. The most familiar examples of this class are stockholders' bills to vacate foreclosure decrees against corporations on the ground of collusion, and bills to enjoin the enforcement of judgments or decrees so as to permit a defendant to interpose a defense or counterclaim which was not provable in the original action.

Dunn v. Clarke, 8 Pet., 1.
Pennock v. Coe, 23 How., 117.
Jones v. Andrews, 10 Wall., 327.
Dewey v. Gas. Co., 123 U. S., 329.
Johnson v. Christian, 125 U. S., 642.
Pacific Railroad v. Missouri Railroad, 111 U. S., 505.
Carey v. Houston, etc., R. R. Co., 161 U. S., 115.
Cortes Co. v. Thannhauser, 9 Fed., 226.
Symmes v. Union Trust Co., 60 Fed., 830, 853.
M'Donald v. Seligman, 81 Fed., 753.
Brown v. Walker, 84 Fed., 532.
Broadis v. Broadis, 86 Fed., 951.
Richardson v. Loree, 94 Fed., 375.
Bank of Leland, Fed. Case No. 9452.
Dunlap v. Stetson, 4 Mason, 346; Fed. Case No. 4164.
Thompson v. McReynolds, 29 Fed., 657.

## SIXTH.

### Authorities relied upon by the appellees.

There is not a single authority relied upon by the appellees, which affords the slightest ground for the

maintenance of the present suit. Every one of the cases cited falls under one of the classes specified in the preceding Fifth Point, with the exception of Clark v. Mathewson (12 Pet., 164), which merely holds that where a plaintiff dies, his administrator may revive the action, even though he is a citizen of the same State as the defendant.

In the following cases, cited by the appellees, the suit was in relation to a fund which was in the possession of the Court.

*In re* Sabin, Fed. Case No. 12,195.
Freeman v. Howe, 24 How., 450.
Minnesota Co. v. St. Paul Co., (cited as Milwaukee Co. v. Soutter), 2 Wall., 609.
Krippendorf v. Hyde, 110 U. S., 276.
Pacific Railroad v. Missouri Railroad, 111 U. S., 505.
Gumble v. Pitken, 124 U. S., 131.
White v. Ewing, 159 U. S., 36.
Compton v. Jessup, 62 Fed., 263.
Blake v. Iron & Coal Co., 76 Fed., 624.
Dietzsch v. Haidekopel, 103 Fed., 494.

The following cases were brought to enforce a previous decree or were in aid of an execution.

Bank v. Turnbull, 16 Wall., 190.
Root v. Woolworth, 150 U. S., 401.
New Orleans v. Fisher, 180 U. S., 185.
Lamb v. Ewing, 54 Fed. Rep., 269.
Babcock v. Millard, Fed. Case, No. 699.
Thompson v. McReynolds, 29 Fed., 657.
Hatch v. Door, 4 McLean, 112, Fed. Case, No. 6206.

And, in the following cases, the suits were brought either to enjoin the prosecution of a pending action or the enforcement of a judgment, where the judgment itself was attacked.

Dunn v. Clarke, 8 Peters, 1.
Pennock v. Coe, 23 How., 117,
Jones v. Andrews, 10 Wall., 327.
Cortes Co. v. Thannauser, 9 Fed. Rep., 226.
Bank of Leeland, Fed. Case, No. 9452.
Dunlap v. Stetson, 4 Mason, 349, Fed. Case, No. 4164.

## SEVENTH.

### Application of principles to the facts of the present case.

I. It is manifest that there was no ancillary jurisdiction in the present case, owing to the possession of the fund by the Court. The land had been sold and the proceeds paid to a citizen and resident of New York (p. 237). No part of the fund was held by Mr. Carson, in Texas, as the Court expressly found (p. 354).

II. The present suit was not brought to induce the court to take any action with reference to the judgment at law (Salinas v. Kellogg).

1. The Court was not asked to assist in carrying the judgment into effect, because the judgment had already been carried into effect; and the Court could not have rendered any such assistance, even if it had been asked to do so, because the common law writ of assistance was all that the plaintiff required to make the judgment effective.

In the present case, the writ of assistance was not required, as the possession was not questioned.

2. The Court was not asked to vacate or modify the judgment in any respect; and the mere fact of bringing the present suit was a formal ratification of the judgment, even if it had not already stood unquestioned for eight years.

Robb v. Vos, 155 U. S., 13.

3. The only ground remaining, upon which it could possibly be contended that the present suit was an ancillary one, was that the Court was appealed to to prevent the judgment from being used for a fraudulent purpose. In the original bill of complaint, the Court was asked to enjoin the defendants Stillman and Carson "from mak-

ing fraudulent use of said judgment" (p. 17), and a preliminary injunction was granted accordingly (pp. 63–66). But, obviously, that injunction was a complete nullity. On the facts set forth in the bill, the defendants could not in any conceivable manner have made fraudulent use of the judgment, because the judgment was absolutely *functus officio*. By it, possession had been awarded to Stillman and Carson, and they had conveyed the property to the United States, which was shown to be in possession. It might as well be claimed that, in an action of replevin, where the plaintiff had recovered the chattels and afterwards sold and delivered them to a third person, and where the validity of the judgment was not questioned, he could be restrained from misusing the judgment because he had obtained it by consent; or that he could be so restrained in an action in debt, where a personal judgment had been entered against the defendant and an execution issued and returned satisfied, and no question was raised as to the validity of the judgment. "An execution is the end of the law. It gives the successful party the fruits of his judgment."

United States v. Nourse, 9 Pet., 8, 28.
Central National Bank v. Stevens, 169 U. S., 432, 465.

III. Not only did the complainant in this case not attack the judgment at law, but he based his right to maintain the present suit upon facts which did not come into existence until eight years after the entry of that judgment; that is, upon a new and distinct cause of action, subsequently accruing.

## EIGHTH.

### The Circuit Court was without jurisdiction either at law or in equity.

This case does not fall within the class of cases such as Louisville Trust Co. v. Knott (191 U. S., 225), where, although the Circuit Court has jurisdiction, it has no jurisdiction as a court of equity, because the action should have been brought on the law and not on the equity side of the court. There was no jurisdiction in the present case, either at law or in equity.

I. There was clearly no jurisdiction at law; because there was no diversity of citizenship and the Court had no control of the proceeds of the land or of the person of Mr. Stillman, and personal process was not served upon him within the State of Texas.

Pennoyer v. Neff, 95 U. S., 714.

II. Neither did the Court have any equitable jurisdiction; because a court of chancery would, under no circumstances, have had jurisdiction of the subject of the bill. There was no fund in the possession of the Court, and the defendant Stillman did not reside and could not be served within its jurisdiction. What the complainant attempted to complain of in the present case was not the previous judgment, but a disregard of a stipulation or agreement entered into in the former action, to sell the property which formed the subject of the action and pay a portion of the proceeds to the credit of certain persons who were to act as arbitrators in making distribution. But the bill showed that one arbitrator had died and another had declined to act, that their successors had not been appointed and that Stillman and Carson had no power to appoint such successors and that parties to the agreement, other than Stillman or Carson, had subsequently repudiated it, so that it could not be carried into effect (pp. 14,

28, 497). Therefore, no breach of the agreement by Stillman and Carson was shown. But the complainant, asserting that they had disregarded the agreement, asked the Court, not to vacate the judgment, not even to attempt to enforce the agreement, but to ignore the agreement altogether and adjudicate upon the rights of the parties as they existed at the time it was entered into. Now, that is evidently something which is beyond the power of any court. When the parties were before the court in the original action at law, they claimed certain undivided interests in the land which was the subject of the action. Although some of the parties to the action at law were not parties to the agreement (pp. 26, 29, 415, 455, 456; Salinas v. Stillman, 66 Fed. Rep., 677, 680), and the judgment was rendered upon a verdict and upon additional evidence (pp. 494, 496), yet the complainant contends that the judgment was rendered by consent which vested the title in Stillman and Carson. Assuming that this contention is correct, it does not follow, as asserted by the complainant, that the title vested in Stillman and Carson was in trust. That is merely the averment of a legal conclusion, without any foundation in fact, and must be treated as a nullity.

U. S. v. Ames, 99 U. S., 35, 45.
Ambler v. Choteau, 107 U. S., 586, 591.
Pennie v. Reis, 132 U. S. 464.
Interstate Land Co. v. Maxwell Land Co., 139 U. S., 569, 578.
Kent v. Land Superior Co., 144 U. S., 75, 91.
Chicot County v. Sherwood, 148 U. S., 529, 536.

In other words, in the present case, a certain status existed at the time the arbitration agreement was executed. According to the complainant, the parties voluntarily allowed that status to be changed by the judgment. But they do not complain of the judgment. Therefore, they will not be allowed to complain of the status brought about by the judgment. No court

of equity has any jurisdiction to entertain a suit based upon the breach of a stipulation upon which a judgment was entered and asking to have the issues in that suit litigated over again, where no complaint is made of the judgment itself. So long as the judgment stands and is not questioned, the court must treat it as decisive of the issues in the case. Not only must full faith and credit be given to such judgment by all other courts; but the court which rendered it has no power to litigate anew the issues determined by it, the judgment itself not being attacked. To hold otherwise, would be to assert that a final judgment in an action at law absolutely disposes of all the issues directly involved in the case and at the same time leaves those issues to be determined again, if some stipulation in the case is subsequently disregarded. Before a party can be held to complain of the violations of such an agreement and be granted a rehearing upon the issues involved in the principal action, he must ask to have the judgment in that action set aside. He cannot, at one and the same time, affirm the validity of the judgment and ask the court to litigate anew the issues finally determined by the judgment. If that could be done, there would be no end to litigation and no finality to judgments. The proposition is so obvious that it requires no citation of authorities in its support. A similar contention by another of the parties to this same arbitration agreement was summarily disposed of by the United States Circuit Court of Appeals.

Salinas v. Stillman, 66 Fed. Rep., 677, 680.

In that case, the Court commented on the fact that there was no averment that the parties had been misled or deceived as to the purport and effect of the agreement and that there was no impropriety in not having brought the agreement to the attention of the Court; and it said (p. 680):

> "So far as it was attempted by the parties to settle their differences out of court by arbitration or

in any other amicable manner, the proceeding is to be commended rather than adversely criticised. Parties may adjust their differences out of court and afterwards give effect to the settlement by a judgment or decree of court, which will be as binding and conclusive as any other adjudication."

In Last Chance Mining Co. v. Tyler Mining Co. (157 U. S., 683, 692) this Court said:

"The withdrawal by defendants of their answer may have prevented any judicial determination as to the special facts set up in defense or avoidance of plaintiff's claim. But such withdrawal was not operative to take out of the case the complaint or the allegations of fact therein contained or to prevent a judicial determination of those facts."

And, in the same case, the Court said:

"The essence of estoppel by judgment is that there has been a judicial determination of a fact; and the question always is, has there been such determination and not upon what evidence or by what means was it reached."

No Court of Chancery, however broad its jurisdiction, would have had power to assume jurisdiction in present case, the fund not being in its possession, some of the parties not being within its jurisdiction and the validity of the judgment in the previous action not being in any way called in question. The mere breach of a contract confers no equitable jurisdiction; and a bill for damages, for breach of contract, is entirely foreign to equitable jurisprudence.

Richards v. Lake Shore Ry. Co., 124 Ill., 569.

As is also a bill in equity to recover the possession of land.

Lewis v. Cox, 23 Wall., 466.

To contend, as is done in the present case, that, because a party to a contract has violated its terms,

therefore, a court of equity will interfere, not to enforce the contract, but to disregard it altogether and relegate the parties to the status which existed prior to entering into the contract and to determine their legal rights by ignoring the change which was voluntarily made in the rights by the contract, would be to introduce an entirely new principle into our jurisprudence, to disregard a contract voluntarily entered into, because one of the parties has been guilty of a breach of it, and, thereupon, to ascertain what the rights of the parties would have been if they had not voluntarily changed them.

III. The position of the complainants in the present suit is substantially the same as if they had not been made parties to the original action at law. In that case, if they had subsequently shown that they had an interest in the land, they might either have enforced a recognition in a proper action, ignoring the judgment, or they might have elected to treat the judgment as valid and have proceeded against the persons who received the proceeds of the land for the proportion to which they were entitled. In the latter event, it is quite clear that the action would not be ancillary to the one in which the title to the land had been adjudicated, but would be merely an action for the recovery of money received to the use of the plaintiff.

IV. Upon the complainant's theory, if a joint money judgment was rendered in a Federal Court in favor of two plaintiffs who were citizens of the same place, and it was specifically adjudicated that the payment by the judgment debtor to either of the judgment creditors would be a satisfaction of the judgment, and thereafter the amount was paid to one of the creditors, the other creditor might maintain a suit, in the same Court, against the co-plaintiff, on the ground that it was "ancillary", to recover a definite portion of the fund by reason of a stipulation between them in the action at law.

## NINTH.

### Complainant's Remedy.

I. On the assumption that the complainant had an interest in the Fort Brown Reservation and was entitled to the portion of the proceeds allowed by the Court below ($2,771.30, or less than two per cent.), his remedy for the breach of the arbitration agreement was clear and well defined, namely, an action at law against Mr. Stillman, to whom the proceeds had been paid. This would have been the familiar action of money had and received to complainant's use. It is not claimed that Mr. Stillman was not fully able to pay any amount which might have been recovered by the complainant against him. On the contrary, the record shows that Mr. Stillman was the only person who, through a long series of years, advanced the funds necessary to prosecute the claim against the United States for the use and occupation of the Fort Brown property; and, subsequently, for ten years more, he alone supplied the means necessary to enforce the payment of the appropriation, which was subjected to continuous attacks, both in the War Department and in Congress (pp. 236, 237). In other words, it is perfectly clear that whatever cause of action the complainant had was an independent one, growing out of the alleged breach of the contract, and having nothing whatever to do with the judgment in Salinas v. Kellogg, which finally disposed of the issues in that action. That judgment was completely carried into effect by the sale of the property to the United States; and its validity has never been questioned.

The plaintiff could not have maintained a suit in equity to enforce the arbitration agreement specifically, because he showed affirmatively that, owing to the death of the arbitrators, the agreement could not have been so enforced; while it is elementary that any party to an arbitration agreement may withdraw from it at

any time before the award has been made. Neither could he have maintained an independent suit in equity for an accounting; because his interest in the proceeds of the property did not in any way depend upon a general accounting of the fund, but in establishing affirmatively that he originally had title to a portion of the property from which the proceeds were derived. Having shown that, it was of no consequence what others might show; they could prove nothing which would conflict with his claim.

II. But whether the action was one at law or in equity, it could be maintained only in a court that held or could acquire a lien upon the proceeds of the property or which had jurisdiction over Mr. Stillman personally. Upon the facts of the present case, only a New York Court could have acquired jurisdiction. The action of the Court below, in assuming jurisdiction and directing a non-resident to pay a large sum into its registry for the purposes of litigation, was apparently based upon the theory that the complainant should not be forced to go beyond the State of Texas to establish his legal rights; and for the purpose of making this theory effective, the Court not only required a non-resident citizen to pay over the entire appropriation, although only one-half of it was claimed by the complainant, but it usurped the jurisdiction of the probate court in order to do what it conceived to be substantial justice to all concerned, by refusing to direct distribution of half the fund remaining to Mr. Carson, as administrator, and by directing this half to be paid to the " heirs " of the Estate which he represented, thus ignoring the rights of creditors of that estate, and the rights of legal representatives and creditors of deceased " heirs," and by requiring Mr. Stillman, who had large claims against the Cavazos estate, to intervene specially in the present suit for the purpose of establishing such claims (pp. 409, 411-414).

It is undoubtedly true that it is inconvenient and often a hardship to compel a suitor to go into a foreign

jurisdiction for the purpose of asserting his legal rights; but that is unavoidable under our present judicial system and form of government.

## TENTH.

**The judgment of the Court below should be reversed, the intermediate orders and decrees set aside and restitution directed to be made to Mr. Stillman of the amount paid into Court by him.**

Washington, March, 1905.

Respectfully submitted,

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